United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING

ORIGINAL

76-7208,7211

To be argued by
VICTOR S. CICHANOWICZ

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P/S

United States Court of Appeals
FOR THE SECOND CIRCUIT

BENITO LOPEZ,
Plaintiff-Appellee,

against

EGAN OLDENDORF,
Defendant and Third Party Plaintiff-Appellant and Appellee,

against

INTERNATIONAL TERMINAL OPERATING CO., INC. and HOFFMAN RIGGING AND CRANE SERVICE, INC.,
Third Party Defendants-Appellants and Appellees.

BENITO LOPEZ,
Plaintiff-Appellee,

against

EGAN OLDENDORF and HOFFMAN RIGGING & CRANE SERVICE, INC.,
Defendants-Appellants and Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITION FOR REHEARING

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PETITION FOR REHEARING

Defendant and Third Party Plaintiff Appellant and Appellee Egon Oldendorf (hereinafter Oldendorf or shipowner) respectfully petitions for a rehearing of the Court's determination in its opinion of December 9, 1976 that the award to Oldendorf against ITO was contribution rather than indemnity; that Oldendorf was the party better situated to adopt preventive measures and its conduct precluded indemnity; and that Oldendorf waived its right to challenge the jury verdict for inconsistency.

Statement

The reason this application is made is because the Court's determination is inconsistent with the record in this case and is in conflict with the undisputed facts and overlooks the applicable controlling law.

The Argument

I

The record is clear that at no time did the trial court hold that the indemnity awarded to the shipowner against the stevedore ITO was limited to 50% of the damages rather than full recovery. The trial court was specific at all times that it was for the full amount of damages which had been assessed against Oldendorf and that contribution was clearly not intended. The 50% apportionment was between ITO and Hoffman and not between ITO and Oldendorf, and was decreed to avoid the risk of having ITO pay the total amount and Hoffman go scot-free.

Before proceeding with the resolution of the third party claims after the return of the jury verdict, the trial court convened counsel for the purpose of discussing the resolu-

tion of the remaining claims and cross-claims and indicating its views. (Doc. No. 90, p. 3)*

After reading this Court's opinion in *Rodriguez* v. *Olaf Pedersen's Rederi A/S,* 527 F.2d 1282, the trial court said:

> "I have some doubt that the shipowner can be prevented from its claim over against the stevedore, so that any judgment that I order against the shipowner, and I order judgment in the full amount, that is, the full amount as reduced against the shipowner, can be recovered over against the stevedore." (Doc. No. 90, p. 3)

It then further said:

> "If I understand *Rodriguez* correctly, it isn't a question of some part of the shipowner's liability, the expression used in the opinion is 'all or nothing'."

To this, ITO's counsel responded: "That's right" (Doc. No. 90, p. 4).

After a study of this Court's opinion in the *Rodriguez* case, the Court further stated:

> "Then as I studied that, it looked to me as if, therefore, the full amount would be recoverable from the stevedore, and if there is no contribution between joint tort feasors, it seemed difficult to me to conceive of a claim by the stevedore for part of its payment against Hoffman." (Doc. No. 90, p. 4)

In indicating that plaintiff's motion to assert a direct claim against Hoffman ought to be granted, the trial court

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* References followed by a, are to the appendix. Other references are to Document and page numbers of the record and relate to issues which the parties indicated they did not intend to present on the appeal as provided for in Rule 10, Federal Rules of Appellate Procedure, 28 U.S.C.A.

again reiterated that contribution was not intended, stating:

> "[I]t seems to me, if I can't divide the loss equally between shipowner, stevedore, and Hoffman, I certainly ought to be able, in the interest of justice, to divide it equally as between the stevedore and Hoffman, and I can't run the risk of having the stevedore stuck for 100% of the loss and Hoffman, because of the mess the judges have made of this area of the law, go scot-free." (Doc. No. 90, pp. 3-4)

Thereafter, in the course of further colloquy with respect to the *Rodriguez* decision, both Court and counsel for ITO agreed that under the decisions, including *Cooper Stevedoring Co., Inc.* v. *Kopke*, 417 U.S. 106 (1974), indemnity but not contribution could be awarded against ITO. Counsel for ITO, sought to avoid the *Rodriguez* decision by arguing that in that case shipowner negligence was raised in the context that it was conduct sufficient to preclude indemnity, whereas in the subject action shipowner negligence was urged only in the context of a legal bar to the implied warranty of workmanlike service (Doc. No. 90, pp. 8-13).

Thereafter, on the trial of Oldendorf's action for indemnity, counsel for ITO questioned Oldendorf's entitlement to counsel fees and when the Court overruled the objections, requested time to determine whether or not agreement could be reached as to the amount. This was granted. After the shipowner rested his case, the Court stated:

> "All right. You are entitled to a judgment for the amount of the judgment against you plus counsel fees, and we won't enter the judgment offer until Mr. Cohen or Mr. Schwartz have had a chance to review the matter and discuss it." (Doc. No. 92, p. 13)

Counsel for Oldendorf then moved to dismiss ITO's counterclaim against him. Said counterclaim sought in-

demnity from the shipowner for an amount equal to the extent that any liability on the part of ITO was caused, brought about, or contributed to, by the shipowner. The Court reviewed the decision in *Desiano* v. *Norddeutscher Lloyd*, 301 F.Supp. 241 (S.D.N.Y. 1969), and then stated:

> "Yes, I think that this decision is correct and would indicate that the counterclaim of the stevedore against the shipowner has to be dismissed.
>
> "The stevedore in the case at bar is being held liable to the shipowner because of the breach of the stevedore's warranty and, therefore, it cannot recover as against the shipowner and the counterclaim must be dismissed and is dismissed." (Doc. No. 92, p. 19)

When the parties had rested, following the trial of plaintiff's direct action against Hoffman, and after the Court's finding that Hoffman was negligent, the Court said:

> "As to all the other issues in the case and how we resolve this, fairness and equity and justice, it seems to me, are served if the recovery of the plaintiff or if half the damages—and if it is necessary to fix damages I am going to accept the jury's verdict in that respect—half of the damages ought to be borne by the stevedore and half of the damages ought to be borne by Hoffman, the crane operator.
>
> "In the midst of all this welter of Second Circuit law, claims, counterclaims and cross claims and direct claims, I don't know how I can pick my way to accomplish that result, but that is what I have to figure out." (Doc. No. 92, p. 114)

In the discussion of how the result proposed by the trial court was to be accomplished, counsel for ITO urged: "I say that the most we should be held liable, if at all, is the 15 percent of our employee's contributory negligence in this case, and that should be the sum total of our liability in this case, if at all" (Doc. No. 92, p. 117).

The Court again rejected this contention because it represented contribution, stating: "Rodriguez gives me no choice. It says all or nothing, and it says all." (Doc. No. 92, p. 117).

After this Court's decision in *Hartnett* v. *Reiss S.S. Co.*, 421 F.2d 1011 was offered to assist in formulating a judgment, the Court said:

> "I have read the Hartnett case, * * *.
> In a situation very similar to our own, the Court of Appeals approved an equal division of liability as between parties who correspond to ITO and Hoffman here." (Doc. No. 92, p. 125)

It is thus unmistakably clear that the 50% award to Oldendorf against ITO was not awarded as contribution between Oldendorf and ITO as joint tort feasors, but for the purpose of protecting ITO from bearing the full brunt of the judgment. Judgments must be interpreted in the light of the Court's findings and opinion. *Great Lakes Dredge & Dock Co.* v. *Hoffman*, 319 U.S. 294, 295 (1943). Since the award against ITO was made because of ITO's breach of its duty to provide a longshoreman who would not be negligent, *McLaughlin* v. *Trelleborgs*, 408 F.2d 1334, 1337 (2 Cir. 1969) cert. den. sub. nom. *Golten Marine Co.* v. *Trelleborgs*, 395 U.S. 946 (1969), and not because of plaintiff's negligence, the decision below was correct and in accord with *Ryan Stevedoring Co.* v. *Pan Atlantic Steamship Corp.*, 350 U.S. 124, 134 (1956).

II

Since ITO only briefed and argued that the award against it in favor of Hoffman was improper because it amounted to contribution, and did not raise, brief or argue this defense against Oldendorf, the judgment awarding Oldendorf 50% indemnity against ITO should have been sustained. *Calvert* v. *Kathy Taxi, Inc.*, 413 F.2d 841, 850

(2 Cir. 1969). It is also the rule that claims not raised in the trial court cannot be raised for the first time on appeal. *Schwartz* v. *S.S. Nassau*, 345 F.2d 465, 466 (2 Cir. 1965) cert. den. 382 U.S. 919 (1965). While judgments may at times be affirmed on grounds not urged below, they may not be reversed on grounds which have not been raised. *Palmer* v. *R.F.C.*, 164 F.2d 466, 468 (2 Cir. 1948) cert. den. 334 U.S. 811 (1948). In *Rondeau* v. *Mosinee Paper Corp.*, 422 U.S. 49, 61-62 n. 11 (1975) the Supreme Court spoke disapprovingly of altering judgments on grounds which have not been made the subject of the appeal.

In *Singleton* v. *Wulff*, —— U.S. ——, 49 L. Ed 2d 826, 837 (1976) the Supreme Court held that in those exceptional circumstances in which a federal appellate court is justified in resolving an issue not passed on below, it may not do so if it involves an issue on which the parties have had no opportunity to introduce evidence or to present whatever legal arguments they may have.

In holding that "Oldendorf was the party best situated to adopt preventive measures and thereby reduce the likelihood of injury", the Court overlooked the fact that ITO had notice through its signalman as well as the plaintiff and other longshoremen of the alleged absence of chocks and lashings (146a, 157a, 268a). In *Henry* v. *A/S Ocean*, 512 F.2d 401, 407 (2 Cir. 1975), this Court held that while the shipowner may be responsible for the unsafe conditions which caused the injury, the stevedore who proceeds with its work in the face of known defects and does not correct them or stop work until they are corrected, rather than the shipowner is the party best situated to adopt preventive measures and avert the injuries.

The Court also overlooked the fact that after ITO's signalman instructed Hogan merely to raise the hook, Hogan raised the boom of the crane instead, causing the draft to drag to the inshore side; and the signalman stood by and watched but did nothing though he was Hogan's

eyes and ears (186a) and it was his function to signal Hogan when to start and stop (196a, 207a, 209a, 210a, 220a). In *Italia Societa* v. *Oregon Stevedoring Co.*, 376 U.S. 315 (1964) the Supreme Court in speaking of the party best situated to take preventive measures, said at page 324:

> "Where, as here, the injury producing and defective equipment is under the supervision and control of the stevedore, the shipowner is powerless to minimize the risk; the stevedore is not."

It was undisputed that ITO had supervision and control over the discharging operation and that its signalman determined when to start and stop the operation and what cargo and the place from where to remove it.

Hurdich v. *Eastmont Shipping Corp.*, 503 F.2d 397 (2 Cir. 1974), does not preclude indemnity in this case. As this Court points out in *Rodriguez* v. *Olaf Pedersen's Rederei A/S*, 527 F.2d 1282, *Hurdich* is distinguishable on its facts and is not applicable where as here the stevedore's breach consists of the contributory negligence of its own employee. Furthermore, in *Hurdich*, the shipowner's conduct was an intervening cause, whereas in this case ITO's and Hoffman's conduct intervened. In *Crumady* v. *J. H. Fisser*, 358 U.S. 423 (1959), the Supreme Court held that the warranty of workmanlike service is breached when stevedore conduct brings an unsafe condition into play.

Since the fault with which the shipowner is charged is the creation of a potentially hazardous condition, there was nothing about this negligence which prevented or hindered plaintiff from positioning himself out of the reach of the beam which struck him when it was dislodged as his other fellow workers had done. Nor did it prevent ITO's signalman from signaling Hogan to stop dragging the draft across the hatch before it came in contact with the beam

rather than watch and delay the stop signal until after plaintiff's accident. Nor did it prevent ITO from delaying the discharging operation until the beams were relashed and chocks and bracings replaced.

It does seem that since, according to the photographs (Ex. C-1, D1) taken shortly before plaintiff's accident, the beam in question was braced at each end with timbers, there is evidence in the record which sustains the indemnity award against ITO and that that portion of the judgment therefore should have been sustained.

III

In denying motions to dismiss and for a directed verdict after the parties had rested and prior to the charge and submission of the case to the jury, the Court said:

> "I had some doubt as to whether this was negligence or unseaworthiness, but in the case of doubt I think it better to resolve it in favor of submitting both claims, both negligence and unseaworthiness, on the issue whether at the time the load was formed the lashing and the chocks had been removed which may have been negligence or which, according to the plaintiffs claim, was negligence and which may have, by reason of such negligence, created an unseaworthy condition because it was no longer a safe place to work." (157a)

In *Keen* v. *Overseas Tankship Corp.*, 194 F.2d 515, 519 (2 Cir. 1952), this Court held that once a party has made his position known and the Court has ruled on it, his position is preserved and it is not necessary to reassert what has been overruled every time the occasion comes up again.

Oldendorf accordingly did not waive its right to urge inconsistency of the verdict.

CONCLUSION

It is respectfully prayed that the Petition for Rehearing should be granted and upon rehearing and further consideration, the determination as to waiver, contribution and conduct precluding indemnity be vacated and that the relief heretofore prayed for be granted.

Respectfully submitted,

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Certificate of Counsel

I, Victor S. Cichanowicz, a member of the firm of Cichanowicz & Callan, attorneys for the Appellant-Appellee Egan Oldendorf, do hereby certify that the foregoing Petition For Rehearing is presented in good faith and not for the purpose of delay.

Victor S. Cichanowicz

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BENITO LOPEZ,

Plaintiff-Appellee,

against

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Defendant and Third-Party Plaintiff-Appellant and Appellee

against

INTERNATIONAL TERMINAL OPER. CO. et al.,

Third Party Defendants-Appellants and Appellees.

State of New York,
County of New York,
City of New York—ss.:

IRVING LIGHTMAN being duly sworn, deposes and says that he is over the age of 18 years. That on the 23rd day of December, 1976, he served two copies of the on

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See attached list

the attorneys for ~~the~~ see attached list

by depositing the same, properly enclosed in a securely sealed post-paid wrapper, in a Branch Post Office regularly maintained by the Government of the United States at 90 Church Street, Borough of Manhattan, City of New York, directed to said attorneys at No. See attached list ( ) N. Y., that being the address designated by them for that purpose upon the preceding papers in this action.

A. Courtney Lightman

Sworn to before me this

23rd day of December , 1976

Courtney J. Brown

COURTNEY J. BROWN
Notary Public, State of New York
No. 31-5472920
Qualified in New York County
Commission Expires March 30, 1978